STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals
Judges: William C. Whitbeck, Helene N. White, and Pat M. Donofrio

PEOPLE OF THE STATE OF MICHIGAN

Plaintiff-Appellant

-vs-

LATASHA GENISE MORSON

Defendant-Appellee.
_____/

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Attorney for Plaintiff-Appellant

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Attorney for Defendant-Appellee

Supreme Court No. 124083

Court of Appeals No. 238750

Lower Court No. 99-167284 FC

BRIEF ON APPEAL – DEFENDANT-APPELLEE
(ORAL ARGUMENT REQUESTED)

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STATEMENT OF JURISDICTION

Defendant-Appellee agrees that this Court has jurisdiction over this case.

STATEMENT OF QUESTIONS PRESENTED

I. UNLESS OTHERWISE SPECIFIED, DO THE OFFENSE VARIABLES IN THE LEGISLATIVE GUIDELINES REFER TO, AND ARE THEY ONLY SCORED BASED UPON, THE ACTS WHICH DEFINE THE PARTICULAR OFFENSE BEING SCORED?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

A. IN MULTIPLE OFFENDER CASES, DO OV 1 AND OV 3 REQUIRE THE COURT TO SCORE NOT SIMPLY THE HIGHEST NUMBER OF POINTS, BUT THE HIGHEST NUMBER OF POINTS THAT PROPERLY APPLY TO THE PARTICULAR OFFENSE BEING SCORED?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

B. IS A SENTENCING COURT BOUND IN THE CASE BEFORE IT BY A SCORE FOR OV 1 OR OV 3 PREVIOUSLY IMPOSED IN THE CURRENT DEFENDANT'S CO-OFFENDER'S CASE, BUT NOT WHERE THAT SENTENCE IS BASED UPON A CLEARLY ERRONEOUS OFFENSE VARIABLE SCORE?

Court of Appeals answers, "Yes".

Defendant-Appellant answers, "Yes".

C. DOES THE LANGUAGE IN MCL 777.31(2)(B) (OV 1) AND MCL 777.33(2)(A) (OV 3) PERMIT A JUDGE TO ASSESS POINTS IN MULTIPLE OFFENDER CASES BASED ON A CO-OFFENDER'S CONDUCT DURING A DIFFERENT OFFENSE WITH WHICH THE DEFENDANT WAS NOT CHARGED?

Court of Appeals made no answer.

Defendant-Appellant answers, "No".

D. DOES THE NUMBER OF PERSONS PLACED IN DANGER UNDER MCL 777.39 (OV 9) INCLUDE ONLY THOSE ENDANGERED BY THE PARTICULAR OFFENSE BEING SCORED?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

II. DO THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS REQUIRE A JURY DETERMINATION BEYOND A REASONABLE DOUBT OF THE ELEMENTS OF ANOTHER PERSON'S OFFENSE BEFORE A COURT CAN BASE A DEFENDANT'S SENTENCE ON THE OTHER PERSON'S CONDUCT?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

A. DO THE CONSTITUTIONAL DUE PROCESS AND JURY TRIAL RIGHTS REQUIRE A JURY DETERMINATION BEYOND A REASONABLE DOUBT OF EVERY FACT THAT WOULD INCREASE A DEFENDANT'S STATUTORY SENTENCING GUIDELINES RANGE?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

B. IS THE TRIAL COURT PROHIBITED FROM SCORING MS. MORSON FOR NORTHINGTON'S SHOOTING OF BISH BECAUSE THE QUESTION OF HER LIABILITY FOR NORTHINGTON'S ACTS IS AN "ELEMENT" OF AN OFFENSE THAT MUST BE DETERMINED BY A JURY BEYOND A REASONABLE DOUBT BEFORE SHE CAN BE PENALIZED FOR THOSE ACTS?

Court of Appeals made no answer.

Defendant-Appellant answers, "Yes".

SUMMARY OF ARGUMENT

The central dispute over the interpretation of the sentencing guidelines statutes at issue here is a dispute over the default rule: are offense variables in general to be scored based on the single sentencing offense that is being scored, or, rather, based on a broader transactional view. The plain meaning of the statutes in question, in light of the sentencing guidelines scheme as a whole, indicates that the general rule is one of offense-specific scoring. In that context, the language of offense variables 1 and 3 indicates that the "multiple offender" provisions require a judge to assess a defendant the same number of accurately scored points as other co-offenders. That language is broad enough to encompass points assessed to other co-offenders at prior sentencing proceedings, but only if charged with the same offenses. A consequence of the offense-specific view, and of the balance the Legislature struck between individuality and uniformity in sentencing, is that one must be assessed the same number of points that a co-offender received at a prior sentence – but only the same number of points the co-offender received for the same offense, and only if accurately scored. The impact of the offense-specific view is best illustrated in this case by offense variable 9, in which MCL 777.39 (OV 9)'s terse language must mean, in light of the default rule and the absence of contrary language, that "victim" means a victim of the scoring offense – not an aggregate of all the victims from other crimes committed in the same transaction. Points for those victims are appropriately assessed for those particular offenses.

The Federal and State Due Process and Jury Trial Clauses also impact this case. Because the core reasoning of Apprendi v New Jersey, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000) applies to all sentence increases beyond the legislatively prescribed range of penalties, facts which increase the guidelines range for the minimum term must be determined by a jury beyond a

reasonable doubt, when, as here, the guidelines are legislatively mandated. Even apart from that broad import of Apprendi, the constitution requires resentencing here because of the peculiar facts of this case. The touchstone of whether facts must be jury proven is whether they constitute, in effect, an element of an offense. Because liability for another person's conduct is a classic example of an element, a jury must find the elements of the other person's offense (and that the defendant is responsible for that offense) before such facts can be used to enhance a defendant's sentence.

STATEMENT OF FACTS

Defendant-Appellee accepts the Plaintiff-Appellant's Statement of Facts, except to elaborate and clarify as follows.

Iesha Northington is not properly characterized as a co-defendant, as she and Ms. Morson were not tried together before the same judge. In addition, Assault with Intent to Murder is in the same crime class as Armed Robbery and carries the same maximum penalty, so for the purposes of this appeal, it is not clear that AWIM should be characterized as "the most severe offense" as a matter of fact.

On May 29, 1999, at about 9:30 – 10:00 p.m., Deborah Sevakis was walking down Nine Mile Rd. in Ferndale. (43a). Shortly after she passed the Ardmore Party Store, someone tapped her on the shoulder from behind and told her they wanted her purse. She thought it was a joke at first, and told the person something like, "You're nuts," or "I don't think so," then again when the person repeated the request for her purse. (45a-46a). The third time the person told her to give her the purse, the individual had a gun in her hand and said, "I said give me your purse." (46a). The gun pointed at Sevakis was a small black handgun, which the robber held in her left hand. (47a-48a). Sevakis grabbed for the gun, but the person grabbed Sevakis' purse from her shoulder and ran. The purse contained about $100, some credit cards, medications, and other items. (49a-50a). Sevakis yelled, "Call 9-1-1. I've been robbed." (50a). Ms. Morson was not the person that robbed her, and as far as she knew, Ms. Morson had nothing to do with it. (52a, 59a). The whole incident took three to five minutes, but she only saw the gun in the last few seconds of it. (54a).

James Bish saw the purse being taken. (62a, 65a-66a). According to Bish, the robber pushed the victim down and took her purse. (65a-66a). The person he saw was not Ms. Morson.

(66a). Bish put down his beer and chased the robber, telling her, "Drop the purse and I'll let you go." (66a). In front of the Ardmore Party Store, the robber turned and shot Bish from two feet away as she was running. (67a). Bish continued to run for about fifty feet until he started gasping for air, then he returned to the party store to ask the owner to call 9-1-1. (68a).

Sevakis saw James Bish run from the apartments by the Ardmore Party Store and chase the robber. She went in that direction too and saw that Bish had been shot. (51a-52a).

Det. George Hartley interrogated Ms. Morson on June 4, 1999.[1] Ms. Morson told him that she had been hospitalized and was on medication, but he did not inquire as to what medication she had taken. (98a-99a). Hartley testified that he read Ms. Morson her rights after telling her that he had information that she was involved. (T 84a-86a). According to Hartley, Ms. Morson gave the following version of events. She told him that she had been driving around with Iesha Northington. They saw a lady walking on West Nine Mile in Ferndale. They had discussed stealing her purse. She had handed Northington a small, black revolver with a brown handle. Ms. Morson stopped the car and Northington got out. Ms. Morson went around the corner to a gas station parking lot. Shortly afterward, Northington returned running, telling her she just shot a man. She had a women's purse, which both went through while Ms. Morson was driving. Ms. Morson threw a pill bottle from the purse out of the car. They went to a gas station on Seven Mile and purchased $1 of gasoline with a credit card to see if it was valid, then went to a Super K-mart and did some shopping. The card was invalid by the time they tried to make the purchases. They then went to another gas station where they spoke with some of Northington's friends for a few moments. Ms. Morson then took Northington home. (86a-87a). Hartley also testified that Ms. Morson told him

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1 The trial court initially suppressed Ms. Morson's statement to police and the Court of Appeals denied the prosecution's interlocutory application for leave to appeal. After the Supreme Court remanded for reconsideration as on leave granted, the Court of Appeals then reversed the trial court's decision and ruled the statement admissible.

she got the gun from her friend Jermaine and returned it to him the weekend before she was arrested. (88a).

The prosecution also admitted a signed, written statement by Ms. Morson:

> "On Saturday, Iesha and I were driving down Nine Mile Road. We saw a lady walking with her purse and discussed robbing her. Iesha got out of the car. I drove around the apartment complex to the other side and didn't see Iesha. I pulled into a gas station, and Iesha appeared running with a black purse. She got inside, and we pulled off. I noticed a man running and holding his chest. Iesha told me she thought she shot the man in the chest. We drove to a gas station while Iesha went through the purse throwing things out of the window. We stopped and got gas, went to Super Kmart on Seven Mile Road, tried to use the credit card, and it declined. We left Super Kmart and seen Iesha's friend Brian and Web [sic]. We talked for a few seconds and went home.
>
> I gave Iesha the gun that I had previously got from Jermaine Calloway." (90a-91a).

ARGUMENT

I. UNLESS OTHERWISE SPECIFIED, THE OFFENSE VARIABLES IN THE LEGISLATIVE GUIDELINES REFER TO, AND ARE ONLY SCORED BASED UPON, THE ACTS WHICH DEFINE THE PARTICULAR OFFENSE BEING SCORED.

The proper interpretation of the statutes setting forth all three guidelines variables at issue in this case depends upon whether each of those offense variables is to be scored based upon the offense being scored, or based upon a broader transactional view. More particularly, this case presents a dispute over where the "default" lies, because the language of the individual variables at issue here does not say, in so many words, that either a transactional view or an offense-specific one governs. The statutes in question, however, are only properly viewed in the context of the statutory sentencing scheme as a whole. When read together, the plain meaning of the various statutes that comprise the sentencing guidelines legislation becomes clear: the default position is that each offense variable is to be scored for the scoring offense only – unless otherwise specified.

Within the broader scheme, there are variables that apply to conduct beyond the sentencing offense. None of the variables at issue here, however, is a member of that subset. Those variables would apply to all of the offenses in a multiple offense case or situation. Focusing on the offense in question, but having a smaller number of variables that account for the broader transaction, makes sense, as the whole point of "offense variables" is to determine how serious each offense was. The greater transaction is not irrelevant, and the specific variables dealing expressly with patterns of conduct and criminal behavior extending beyond the offense itself account for this. Moreover, the sentencing judge can rely on "transactional" information to choose where **within the guidelines range** to sentence, and, under appropriate circumstances can depart from the guidelines based on transactional conduct.

The Legislative Scheme

The objective of statutory interpretation is to give effect to the intent of the Legislature. When the language of a statute is clear, it must be enforced as written, as the Legislature is presumed to have intended the meaning plainly expressed. It is also presumed that every word has some meaning, so that courts must avoid any construction that would render any part of the statute surplusage or nugatory. People v Borchard-Ruhland, 460 Mich 278, 284-285 (1999). To discover legislative intent, provisions of a statute must be read in the context of the entire statute to produce, if possible, a harmonious and consistent whole. Michigan ex rel Wayne Co Prosecutor v Bennis, 447 Mich 719, 732 (1994), aff'd Bennis v Michigan, 516 US 442; 116 S Ct 994; 134 L Ed 2d 68 (1996). What governs is the fair and natural import of the statute's terms, in view of the subject matter of the law. People v Morey, 461 Mich 325, 330 (1999).

The starting point here is MCL 777.22(1), which tells the sentencing judge how to score the offense variables:

> "For all crimes against a person, score offense variables 1, 2, 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 19, and 20. Score offense variables 5 and 6 for homicide, attempted homicide, conspiracy or solicitation to commit a homicide, or assault with intent to commit murder. Score offense variable 16 under this subsection for a violation or attempted violation of [MCL 750.110a]. Score offense variables 17 and 18 if an element of the offense or attempted offense involves the operation of a vehicle, vessel, ORV, snowmobile, aircraft, or locomotive." MCL 777.22(1).[2]

The statute goes on in subsections (2) through (5) to specify which variables are to be scored for the other four offense categories. MCL 777.22 thus makes clear that a sentencing judge must score

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[2] At the time of the offense here, MCL 777.22 did not encompass OV 20. The amended statute also expanded the number of offenses in which OV 5 and OV 6 are to be scored.

each offense, because **all** crimes must be scored.[3] The plain language indicates the default position: each offense is viewed separately, because every offense must be scored and different subsets of variables apply to each offense category. Even within an offense category, different subsets of variables apply to different offenses. See MCL 777.22(1) and (5) (limiting certain variables to homicide, home invasion, or vehicular offenses). The statute refers to "a violation" and "the offense" synonymously. If the statute contemplated a transactional approach as a general rule, there would be no need to precisely limit which variables could be scored for which types of offenses. Nor would there be a need to score each offense separately, as all conduct arising from the transaction could be lumped into the scoring for a single offense.

This general rule of offense-specific scoring is made clear by the exceptions. Within the scheme set up by MCL 777.22, the legislature concretely demonstrated that it knew how to specify when a transactional approach was appropriate. Offense variable 14 (offender's role in a multiple offender situation) clearly specifies, "The entire criminal transaction should be considered when scoring this variable." MCL 777.44(2)(a). If the transactional approach were the rule, this language would be completely superfluous. [4] In reality, had the legislature intended a transactional approach,

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[3] Further evidence that the statute requires the sentencing judge to score each conviction offense separately is the requirement to sentence within the guidelines. MCL 769.34(2) makes sentencing within the guidelines range mandatory, absent a departure, for **all** felonies committed on or after January 1, 1999. A judge cannot know whether she is complying with the sentencing guidelines legislation, or whether it is necessary to articulate reasons for departure as specified in MCL 769.34(3), without scoring each offense, even if the sentence for that offense is not controlling. It is of no consequence that the probation statute requires probation officers to report the guidelines computation in the presentence report only for the offenses with the highest crime class and for offenses which will result in a consecutive sentence. MCL 771.14(2)(e)(i) and (ii) clearly deal with the reporting responsibilities of probation agents, not the scoring obligations of the sentencing judge who is ultimately responsible for the sentence. Nor does that statute purport to supersede the guidelines legislation itself. That the assistance probation is required to provide is limited does not speak to meaning of the guidelines scoring statute itself.

[4] The prosecution's only explanation of the language of MCL 777.44(2)(a) (OV 14) is the speculative suggestion that the Legislature only intended to point out that there could be

it would either have omitted that language entirely, or it would have included that same language verbatim in every single variable – as it did with the prefatory language to each variable directing that it is to be scored "by determining which of the following apply and by assigning the number of points attributable. . . ."[5]

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different leaders in different parts of a criminal transaction. The prosecution offers no textual support for this limitation. The language of the transactional provision is broad, only limiting its scope to "scoring this variable." Equally broad is the language of subsection (2), which simply says that "**All** of the following apply to scoring offense variable 14." (emphasis added). No necessary linkage between subsections (a) and (b) is implied, and this Court should not read one in.

Indeed, the artificiality of imposing such a reading on OV 14 becomes clear when similar sections of other guidelines variables are considered. MCL 777.31(2) (OV 1), for instance, provides similarly that "All of the following apply to scoring offense variable 1." However, the subsections are an assorted list of provisions which guide the application of subsection (1), and they are clearly not intended to apply only to each other. For instance, subsection (b) is the multi-offender provision at issue in this case, and subsection (c) deals with the 5 point score for implying a weapon, but it is not viable to contend that subsection (b) is limited by subsection (c) such that multiple offender scoring only applies to the 5 point level. The "all of the following apply" provisions in the offense variables in general are best viewed as exceptions to, or clarifications of, the general rules which apply to all variables or the rules which have been set forth in a particular variable. To be sure, the prosecution's reading of OV 14 describes one **possible** consequence that flows from MCL 777.44(2)(a) and (b), but it is by no means the only one. Even within the same offense, for instance, without any broader transaction to consider, more than one person could share a leadership role in a group.

5 The use of repeated verbatim language also indicates the Legislature's intent to treat each variable, and each offense, separately. The instruction to score the highest number of points attributable is repeated in each and every single offense variable to date. This leaves open the possibility of designing future variables in which that instruction does not apply. The selective use of repetition makes clear that language found in any given variable applies if, but only if, it is specified in that particular variable. Where the legislature wanted certain terms met in more than one variable, it demonstrated its intent by repeating that language. Thus, the instruction to score the same number of points in multiple-offender cases is repeated in several variables, but not in all of them. Thus, the Legislature did not intend for all offenders in multiple offender cases to receive the same score on all variables, but only on those where it so specified. Likewise, had the legislature intended a transactional approach in the variables at issue, it would have undoubtedly repeated the language from OV 14, or otherwise set conditions on what offenses were to be included in considering that

In other offense variables, the legislature unambiguously made it known when behavior outside of the scored offense is to be taken into account. Offense variable 12, for instance, applies to acts which occurred within 24 hours of the sentencing offense which have not resulted in separate convictions. MCL 777.42(2)(a). Offense Variable 13 explicitly permits scoring for "all crimes within a 5-year period, including the sentencing offense" regardless of whether they resulted in conviction. MCL 777.43 (2)(a). Offense variable 16 specifies:

> "In multiple offender or victim cases, the appropriate points may be determined by adding together the aggregate value of the property involved, including property involved in uncharged offenses or charges dismissed under a plea agreement." MCL 777.47(2)(a).

It further specifies that "[t]he amount of money or property involved in admitted but uncharged offenses or in charges that have been dismissed under a plea agreement may be considered." MCL 777.47(2)(c). The OV 16 language is particularly illustrative here. Had the legislature intended that people in Ms. Morson's situation would be scored for uncharged acts, it would likely have included language similar to that in OV 16. See also MCL 777.38 (OV 8) (scoring for victim asportation or captivity by specifically focusing on conduct "beyond the time necessary to commit the offense").

The textual argument set forth by the prosecution is misguided. Simply put, the prosecution improperly interprets the meaning of the statutes in question – the final product of the Legislature's and the Sentencing Commission's work – by referring to the phrase "offense characteristics" found in the enabling legislation. (Plaintiff-Appellant's Brief at 24). It is of dubious value to place so much reliance on the definition of a term which is not used at all in the guidelines scoring statutes of MCL 777.1 et. seq. Moreover, it should be clear that the end result of the process started in MCL

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variable. Alternatively, it would have placed that language in MCL 777.22, rather than in only a single offense variable.

769.31 through MCL 769.33 that results in the controlling statutory language, not the motivating legislation setting up the commission.

The transactional language on which the prosecution relies is found in MCL 769.31(d) (as amended in 2002), and at the time of the offense here was found in MCL 769.31(e): "**For purposes of this subdivision**, an offense described in [MCL 791.233b] that resulted in a conviction and that arose out of the same transaction as the offense for which the sentencing guidelines are being scored **shall be considered as an aggravating factor**." (emphasis added). Notably, the source of the definition upon which the prosecution relies, MCL 769.31, begins by setting forth the limited application of the definitions that follow: "**As used in this section and sections 32 to 34 of this chapter**," i.e., MCL 769.31 through 769.34. (emphasis added).[6] It is simply not tenable to claim that MCL 769.31 is the "general definitional section" for MCL 777.1 et. seq.[7]

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[6] The 2002 amendment rendered the definitions applicable only to MCL 769.31 and MCL 769.34. It still did not extend the definitions to the instructions for scoring of guidelines variables found in MCL 777.1 et seq.

[7] The prosecution raises the enabling statute in its treatment of OV 9, and argues that since that variable itself does not state a timeframe that a sentencing court can consider, "the pertinent statute to evaluate is the general definitional statute directing the sentencing courts how to evaluate all offense variables." (Plaintiff-Appellant's Brief at 24). The assumption that MCL 769.31(d) is the "general definitional statute" is erroneous. For purposes of this appeal, it cannot be, as it was the 2002 amendments (effective after the offenses in this case) that replaced "commission" in MCL 769.31 with "legislature," the language quoted in the Plaintiff-Appellant's brief. Notably, however, even now, MCL 769.31 simply does not apply to the scoring of guidelines variables. By its own terms, it does not extend to MCL 777.1 et seq., but rather is limited to MCL 769.31 and MCL 769.34. If anything, the "general definitions" section for guidelines scoring is MCL 777.1 which, unlike MCL 769.31, does not limit its applicability to MCL 769.31 and MCL 769.34. Rather, it pertains to the entire chapter MCL 777.1 et. seq. In MCL 777.1, there are some terms which the legislature expressly defined by reference to MCL 769.31. Those relevant to this appeal are not among them. Clearly, the legislature knew how to incorporate prior definitions by reference and chose to do so only in limited fashion. Moreover, the only place where the phrase "offense characteristics" is now found is in MCL 769.34(3)(b), dealing with **departures**. Simply because an "offense characteristic" may be the subject for departure if not adequately accounted for by the guidelines does not mean that the guidelines must be

In context, MCL 769.31(1)(e) defines "offense characteristics" as "elements of the crime and the aggravating and mitigating factors relating to the offense **that the commission determines are appropriate and consistent with the criteria described in [MCL 769.33(1)(e)].**" This definition is important only because it is used in MCL 769.33(1)(e): the provision that, on enactment in 1995, directed the sentencing commission to

> "[d]evelop sentencing guidelines, including sentence ranges for the minimum sentence for each offense and intermediate sanctions as provided in subsection (3), and modifications to the guidelines as provided in subsection (5)."[8]

Subsection (1)(e), both in 1998 and in its original form in 1995, went on to specify the parameters of the commission's task of developing/modifying the guidelines. One of those provisions is aimed at the goal of uniformity in sentencing:

> "The sentencing guidelines and any modifications to the guidelines shall accomplish all of the following:
>
> * * *
>
> (iv) Reduce sentencing disparities based on factors other than offense characteristics and offender characteristics and ensure that offenders with similar offense and offender characteristics receive substantially similar sentences." MCL 769.33(1)(e) (1995).

Plainly, the language referenced from MCL 769.31 through 769.33 was designed to give the commission a mandate to bring its collective wisdom to bear on how to achieve the goal of

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scored in any particular way. Departures, by nature, are meant to cover circumstances not adequately accounted for by the guidelines.

[8] In 1998, after the sentencing commission developed its guidelines, the statute was amended such that subsection (1)(e) related only to modifications, directing the commission to "[d]evelop modifications to the sentencing guidelines as provided in subsection (4)."

uniformity in sentencing. Nothing in this legislation required that each variable within the ultimate scheme embrace a transactional view.

The prosecution also argues that, without a transactional view of each offense variable, the commission would have failed in its mission to reduce disparities in sentencing. (Plaintiff-Appellant's Brief, 31). This is simply not true, as the sentencing court is required to score all offenses: the conduct for a crime in the same transaction will be scored, but for that offense. Moreover, the application of transactional variables such as OV 12, OV 13, and even PRV 7 will more than adequately account for the existence of other criminal conduct that was related, but took place outside of the sentencing offense.

The prosecution also argues that, when scoring a particular offense, courts are not limited to the conduct during the scored offense because the Legislature did not repeat the "arising out of the sentencing offense" language found in OV 11 (criminal sexual penetration). If anything, however, this circumstance only strengthens the case for the offense-specific view. Notably, MCL 777.41(2)(a) does **not** instruct the court to score only the penetration "that forms the basis of a first- or third-degree criminal sexual conduct offense," language used elsewhere in subsection (2)(c). Rather, it uses "arising out of" language that implies a slightly broader view than the offense-specific default, but somewhat less than a full-blown transactional view. If the default rule truly were a transactional approach, and had the Legislature truly intended OV 11 to be the exception, it would have used the language from subsection (2)(c). That subsection (2)(c) itself precludes the court from scoring the one penetration that is the basis for the conviction – when the entire variable scores only criminal sexual penetrations – also suggests that the "arising out of" language is not a

limitation on some default transactional approach, but an expansion beyond the offense-specific default.[9]

Part of the confusion may stem from the fact that not all crimes occur instantaneously and some, such as kidnapping, usually take place over an extended period of time. If the conditions set forth in a particular offense variable are met before the completion of the crime – e.g., while a kidnapping victim is still being asported, or while a robbery is still in progress – then they are properly scored. As this Court has recently held, robbery is not a continuing offense and is completed once the forceful taking has been effected. People v Randolph, 466 Mich 532 (2002). Here, the robbery ended once Northington made off with Sevakis' purse, so there is no ambiguity about what conduct can be scored for the robbery guidelines.

Finally, an offense-specific scheme for scoring of the guidelines does not completely preclude a sentencing judge from considering transactional behavior at all. Conduct by the defendant during the same transaction – and even conduct beyond it – can be considered in determining what sentence the court can give within the guidelines range. Further, it can be a basis for a higher sentence if it is not adequately addressed by the guidelines and if it provides a substantial and compelling reason for departure. MCL 769.34(3). Departures, then, provide an outlet for any oversight that could lead to absurd results, but are limited to extraordinary circumstances so that the exception does not swallow the rule.

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9 In all reality, however, the drafting of OV 11 was likely in response to the quagmire that resulted from fractured judicial interpretations of the Judicial Guidelines analog of OV 11 in People v Raby, 218 Mich App 78 (1996), aff'd 456 Mich 487 (1998). As such, detailed discussion of OV 11 is best left for another day, when specific issues relating to that variable are presented and can be fully briefed in the context of relevant facts, namely a sex offense.

A. IN MULTIPLE OFFENDER CASES, OV 1 AND OV 3 REQUIRE THE COURT TO SCORE NOT SIMPLY THE HIGHEST NUMBER OF POINTS, BUT THE HIGHEST NUMBER OF POINTS THAT PROPERLY APPLY TO THE PARTICULAR OFFENSE BEING SCORED.

Questions Presented by the Court:

(1) how subsection 1 of MCL 777.31 (OV 1), requiring that the "highest number of points" be assigned, should be applied in light of subsection 2(b) requiring that "all offenders" in multiple offender cases be assessed the same number of points;

(2) similarly, how subsection 1 of MCL 777.33 (OV 3), requiring that the "highest number of points" be assigned, should be applied in light of subsection 2(a) requiring that "all offenders" in multiple offender cases be assessed the same number of points.

Statutory Language:

At the time of the offenses here, MCL 777.31 read as follows:

Sec. 31. (1) Offense variable 1 is aggravated use of a weapon. Score offense variable 1 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) A firearm was discharged at or toward a human being or a victim was cut or stabbed with a knife or other cutting or stabbing weapon ..... 25 points
(b) A firearm was pointed at or toward a victim or the victim had a reasonable apprehension of an immediate battery when threatened with a knife or other cutting or stabbing weapon ..... 15 points
(c) The victim was touched by any other type of weapon ..... 10 points
(d) A weapon was displayed or implied ..... 5 points
(e) No aggravated use of a weapon occurred ..... 0 points

(2) All of the following apply to scoring offense variable 1:

(a) Count each person who was placed in danger of injury or loss of life as a victim.

(b) In multiple offender cases, if 1 offender is assessed points for the presence or use of a weapon, all offenders shall be assessed the same number of points.

(c) Score 5 points if an offender used an object to suggest the presence of a weapon.

(d) Do not score 5 points if the conviction offense is a violation of [MCL 750.82 or MCL 750.529].

At the time of the offenses here, MCL 777.33 read as follows:

Sec. 33. (1) Offense variable 3 is physical injury to a victim. Score offense variable 3 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) A victim was killed ..... 100 points
(b) Life threatening or permanent incapacitating injury occurred to a victim ..... 25 points
(c) Bodily injury requiring medical treatment occurred to a victim ..... 10 points
(d) Bodily injury not requiring medical treatment occurred to a victim ..... 5 points
(e) No physical injury occurred to a victim ..... 0 points

(2) All of the following apply to scoring offense variable 3:

(a) In multiple offender cases, if 1 offender is assessed points for death or physical injury, all offenders shall be assessed the same number of points.

(b) Score 100 points if death results from the commission of a crime and homicide is not the sentencing offense.

(c) Do not score 5 points if bodily injury is an element of the sentencing offense.

(3) As used in this section, "requiring medical treatment" refers to the necessity for treatment and not the victim's success in obtaining treatment.

As noted above, the default position for each offense variable is that it is scored based only upon the particular offense which is being scored. The language of MCL 777.31 (OV 1) and MCL

777.33 (OV 3) does not specify, or even suggest, that any transactional approach is appropriate. Unlike other variables, OV 1 and OV 3 do not specify that the court is to look "beyond the time necessary to commit the offense," MCL 777.38 (OV 8) or to consider "the entire criminal transaction." MCL 777.44 (OV 14). Nor did the legislature permit the variable to include consideration of "admitted but uncharged offenses or. . .charges that have been dismissed under a plea agreement." MCL 777.46 (OV 16).

If anything, the language of MCL 777.31 and MCL 777.33 indicates that the appropriate point of reference for this statute is the sentencing offense. MCL 777.31(d) directs the court not to score 5 points "if **the conviction offense** is a violation of [MCL 750.82 or MCL 750.529]." (emphasis added). This seems to embody a clear legislative intent not to enhance one's sentence for a threshold factor that already constitutes an element of the offense. If the entire transaction was to be evaluated, however, so that transactional behavior could enhance the guidelines for each offense in the transaction, it would not make sense to limit the scoring based on the nature of the "conviction offense." If one were looking at an entire transaction, displaying a weapon before or after the armed robbery or felonious assault would be a separate, potentially aggravating, act which is not already accounted for by the "conviction offense." There would be no reason, then, for the legislature to have enacted the limit in subsection (d) if it intended OV 1 to be scored for the entire criminal transaction. Likewise with MCL 777.33(c)'s limitation that one must not score 5 points "if bodily injury is an element of the **sentencing offense**." (emphasis added).

What is at issue here, thus, is the aggravated use of a weapon during the robbery and the level of physical injury caused to a victim **of that robbery**. That robbery was complete once Northington took the purse from Sevakis by force. See Randolph, supra. Thus, even without reference to the "multiple offender" provisions of the statutes in question, the Court of Appeals

specified the proper scores, because a weapon was pointed at Sevakis but not discharged (15 points), because Sevakis was not injured (0 points), and because Ms. Morson was found responsible for the robbery of Sevakis as an aider and abetter. (47a-49a, 54a, 65a-66a, 200a-201a).

The requirement in MCL 777.31(2)(b) and MCL 777.33(2)(a) that "all offenders" in multiple offender cases receive the same score must also be read in light of the earlier language of subsection (1) that directs the court to first determine which of several limited sets of circumstances applies, and then to score the highest number of points attributable to that set of circumstances. Ms. Morson does not dispute the notion that all offenders must be assessed the highest number of accurately scored points. The language of subsection (1) is plainly broad enough to encompass the acts of all "offenders," all those responsible for the offense.[10] The multiple offender provision merely clarifies that, even if the defendant did not personally discharge a weapon or cause bodily injury during the offense, for instance, she would be scored for a co-offender's having done so. In these variables, the Legislature thus expressed its desire to balance uniformity with individuality in sentencing.

The case relied on by the prosecution, People v Libbett, 251 Mich App 353 (2002), correctly sets forth the requirement to score the highest number of accurately scored points, but it does not compel reversal of the Court of Appeals in this case. Libbett does not stand for the proposition that a co-participant must automatically be scored the highest number of points for another's commission of a **different** offense, much less one which the defendant did not aid or abet and which

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[10] Equally, plainly, however, the broad language must have some limit. Read as a whole, it penalizes a defendant on a particular offense for conduct during that offense by someone culpable for it. The statute is not concerned with whether, for instance, a weapon was "displayed or implied" **ever**, in some offense, by anybody. Rather, as noted above, the primary concern is whether one was displayed or implied **in the offense being scored**. Moreover, that weapon must have been displayed or implied by one culpable for that offense, as MCL 777.31(2)(c), makes clear that it must be "an offender" that has used the object.

is not within the scope of the conspiracy and was committed after the object of the conspiracy had been accomplished. In Libbett, both offenders personally participated in the same carjacking offense. It was undisputed that the defendant had pointed a gun at the victim while the accomplice was assisting him in the carjacking. Id., 356, 365. The accomplice pled guilty and had been sentenced first, receiving 5 points on OV 1 and 0 points on OV 3. Libbett's result comported with the spirit of the law to assess the defendant points for doing something directly – pointing a gun – that would have scored 15 points but for the literal language of the statute and the technicality that his accomplice was scored first. The court also had some semblance of legal justification because OV 1 was being scored for the same offense. Neither is true here.

Rather, the guidelines in Northington's case reflect a careful and considered decision to determine which circumstances applied in each offense and to score each individual offense by assigning the highest number of points applicable to that offense. Thus, Northington was apparently scored 25 points on OV 1 for AWIM for discharging a weapon at Bish, but 15 points on OV 1 for the robbery for pointing a gun at Sevakis. In emphasizing the command to score the highest number of points applicable, the prosecution ignores other language in MCL 777.31(1) which requires that the court **first** determine which of the following alternatives apply.

The bottom line is that the meaning of each sentencing guideline statute must be taken in context: the sentencing of an offender for a particular criminal offense – here, the sentence for the armed robbery of Deborah Sevakis. Read in context, the plain meaning of these statutes is that all "offenders," that is, all those who are guilty of the sentencing offense, must receive the same number of accurately scored points for the conduct constituting that offense to promote uniformity in sentencing.

B. A SENTENCING COURT IS BOUND IN THE CASE BEFORE IT BY A SCORE FOR OV 1 OR OV 3 PREVIOUSLY IMPOSED IN THE CURRENT DEFENDANT'S CO-OFFENDER'S CASE, BUT NOT WHERE THAT SENTENCE IS BASED UPON A CLEARLY ERRONEOUS OFFENSE VARIABLE SCORE.

Question Presented by the Court:

> (4) whether under MCL 777.31(2)(b) and 777.33(2)(a) the trial court is bound by a previously-imposed sentence upon a codefendant where that sentence is based upon an erroneous offense variable score

The short answer to this Court's question is no. Under MCL 777.31(2)(b) and 777.33(2)(a), a sentencing court is bound by a previously imposed sentence on a co-offender, but only if the score in question was valid. If the prior score is artificially too low or too high under subsection (1), it is the co-offender's score that is in error and should be corrected on appeal in his or her case. In Ms. Morson's case, however, OV 1 and OV 3 were not scored erroneously, so the answer to this question does not compel reversal of the Court of Appeals decision.

Contrary to the prosecution's contention, (Plaintiff-Appellant's Brief at 14, n 8), defendants need not be sentenced at precisely the same time by the same judge in order to trigger the requirements of OV 1 and OV 3 that all offenders in multiple offender cases receive the same number of points. It is not that the statute is ambiguous or that there is a need to read anything in, as the prosecution suggests, but that the statute's plain language is naturally broad enough to encompass both prior and contemporaneous sentencing decisions.

Defendant agrees that words in a statute must be understood according to their common and approved usage. MCL 8.3a. Where terms are not expressly defined within a statute, courts may

consult dictionary definitions to assist in construing terms in accordance with their plain and generally accepted meanings. People v Morey, 461 Mich 325, 330 (1999). According to Black's Law Dictionary, 7th Ed. (West 1999), at 206, a case is "A proceeding, action, suit, or controversy at law or in equity." Because the guidelines apply only to criminal offenses, a "case" is simply a criminal prosecution. An offender is one who is culpable of a criminal act: according to Black's Law Dictionary, at 1108, "A person who has committed a crime." A "multiple offender case," is, then, a criminal prosecution in which one or more individuals are alleged to be culpable for some or all of the offenses charged.

The phrase "multiple offender cases" does not imply that all participants must be sentenced together, tried together, or even tried at all. All it implies is that there are "cases" – legal proceedings – that involve more than one guilty party. Here, for instance, Ms. Morson's "case" involved two offenders, as she was tried for and convicted of aiding and abetting Northington in a robbery. She could have be tried and convicted as an aider and abetter even had Northington never been prosecuted. It would still be a "multiple offender case." If a fact finder determines in a given case that more than one person was criminally responsible for some or all of the acts, then that is a multiple offender case. It need not be any more cryptic than that. By definition and in context, the plain language of the statute is broad enough to encompass both situations in which defendants are sentenced together and those in which one defendant is sentenced after another.

The goal of uniformity in sentencing supports this view. MCL 769.33(1)(e)(iv), applicable at the time of the offenses here, made clear that uniformity was one of the goals of the legislative guidelines scheme, as it required the commission to reduce sentencing disparities based on factors other than offense and offender characteristics and sought to "ensure that offenders with similar offense and offender characteristics receive substantially similar sentences." Yet, it is also clear that

sentencing must be individualized, with sentences tailored to fit the offense and the offender. People v Chapa, 407 Mich 309, 311 (1979). See also People v Milbourn, 435 Mich 630, 653-654 (1990). The guidelines scheme as a whole reflects this value by carefully laying out prior record variables and an offense-specific view of offense variables in general. These twin purposes – individuality and uniformity – though they exist in tension with each other – are both clearly envisioned by a scheme that, as a general rule, penalizes a defendant for what she is culpable for but also creates some variables so that all offenders in multi-offender cases get the same score.

The prosecution's "present tense" construction satisfies neither of these principles. It would penalize a defendant for conduct for which the she was never found culpable by a fact finder, but would not serve uniformity because it would permit co-offenders to have different scores simply because they are sentenced at a different time and/or by a different judge. It makes little sense to give all co-participants in an offense the same score when sentenced at the same proceeding, but not when, through happenstance, one is tried separately or, even if tried together, sentenced at a different time. Even under the prosecution's interpretation, the statutory language the prosecution would recommend to the Legislature (for instance, using the terms "has been,") would be inadequate to cover the situation where defendants are sentenced simultaneously.

The prosecution's "present tense" argument ultimately proves to be too strained a reading of the statute. Taken at face value, the prosecution's argument would prohibit a sentencing court from following the statutory instructions in subsections (2)(b)/(2)(a) if it considered two defendants at the same sentencing proceeding, but took up one defendant's sentence first. Linguistically, MCL 777.31(2)(b) and MCL 777.33(2)(a) contemplate a linear sequence of events: if one **is** assessed points, then the next to be sentenced **shall be** assessed those points also. It also makes little sense to say that the Legislature did not intend to encompass a situation in which a sentencing judge

addresses the guidelines scores of one defendant before turning to that of the others (whether they are sentenced at the same proceeding or not) – one would think a common practice. But if the prosecution's "present tense" argument is to be believed, the Legislature intended that multiple offenders be assessed the same number of points only in those rare circumstances where a judge hears argument about all offenders simultaneously, and simultaneously announces the number of points to be scored on OV 1 for all of them. Since a judge must individualize the sentence, and not all variables require the same score for co-participants, it seems unlikely that a judge would make such a group assessment. The Legislature could not have intended to so micromanage the manner or order in which courts choose to address the defendants before them.

Since the language of the statute clearly contemplates some sequential assessment of points, but does not specify a time limit, there is no justification for a judge to disregard the instruction once one participant has been sentenced – or for a judge to avoid the instruction by simply ordering that the proceedings take place at different times. Whether sentenced together or in series, before the same or different judges, the score still must be the same. Uniformity in sentencing must mean something.

As argued above, however, one must be assessed the highest number of accurately scored points. Although MCL 777.31(2)(b) and MCL 777.33(2)(a) require the same score, a court only appears to violate the statute by failing to defer to a prior erroneous score because the statute presumes that subsection (1) will be followed and because the general rule is that any errors will be corrected in the case in which the errors are made, not collaterally in another case. See, e.g., People v Roseberry, 465 Mich 713 (2002). Thus, the Legislature undoubtedly presumed in drafting the statute that, whatever the order of sentencing for the offenders, the score in each case would be, according to subsection (1), the highest applicable to the offense. The direction to score the highest

"number of points attributable" reflects the unsurprising proposition that the legislature intended that the guidelines scoring would not be purely discretionary. One cannot have a scheme promoting uniformity in sentencing if judges have discretion to score points regardless of the facts. Thus, the direction to score the highest number of accurately scored points means that the score is to be the appropriate one based on the facts for that offense – no less, but no more either.

This implicit limit on deference has several implications where one offender has already been sentenced. First, while the multiple offender provision does not require blind deference to a co-offender's prior score, it does require some. If there is no deference at all – if a judge is completely free to score under subsection (1) without reference to the prior score at all – then subsection (2) would be superfluous. As a result, since the determination under subsection (1) is a factual one, the prior score must be accepted unless it is clearly erroneous based on the facts shown in the current defendant's case.[11] See People v Babcock, 469 Mich 247, 264-265 (2003) (standard of review for factual determinations in context of guidelines departures is for clear error). While this apparently injects a level of complication by requiring one sentencing judge to defer to another, this is a consequence of the Legislature's construction of offense variables that base one defendant's guidelines score, in part, on another defendant's score.

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[11] The constitutional answer to the question, however, depends on which party seeks to rely on the facts found at the prior proceeding. Criminal defendants have a Sixth Amendment right to counsel at all critical stages of the proceedings, i.e., at every stage where "substantial rights of a criminal accused may be affected." Mempa v Rhay, 389 US 128, 134, 88 S Ct 254, 19 L Ed 2d 336 (1967). This includes sentencing proceedings. Id. See also Townsend v Burke, 334 US 736, 68 S Ct 1252, 92 L Ed 1690 (1948). A sentencing proceeding at which binding decisions adverse to the defendant were made about her sentencing guidelines range could not be anything other than a proceeding at which the defendant's substantial rights were affected. Thus, where a sentencing court purports to assess more points to a defendant based on a prior scoring of a co-offender's guidelines, it may do so only if that defendant was represented by counsel at that prior proceeding.

The second major implication is that even a zero-point score requires this same level of deference. In a vacuum, the language of subsection (2) only requires that all offenders be assessed the same number of points "if" one offender is assessed points for the triggering circumstance. However, as agreed by the prosecution, reading the statutory provisions of subsection (1) and (2) together requires deviation from the literal requirement to assess the "same" number of points. In a case where a co-offender has already been sentenced, the highest number of accurately scored points prevents a judge from deferring to a co-offender's score if it is either artificially too low or too high. But just as the "same number of points" must be read to mean the same number of accurately scored points, so must the phrase, "if one offender is assessed points for. . ." be read to assume that the other offenders' scores are accurate. Thus, even if one offender has been assessed 0 points, all offenders must be assessed 0 points unless that score is clearly erroneous.

C. THE LANGUAGE IN MCL 777.31(2)(B) (OV 1) AND MCL 777.33(2)(A) (OV 3) DOES NOT PERMIT A JUDGE TO ASSESS POINTS IN MULTIPLE OFFENDER CASES BASED ON A CO-OFFENDER'S CONDUCT DURING A DIFFERENT OFFENSE WITH WHICH THE DEFENDANT WAS NOT CHARGED.

Question Presented by the Court:

> (3) whether MCL 777.31(2)(b) and 777.33(2)(a) apply where all "offenders" have not been charged with identical crimes

Discussion:

When scoring a particular offense in a multiple offender case, a judge may not assess the defendant the "same" number of points as one or more co-offenders if that defendant has not been charged with the same crime as any of the others. This is not necessarily[12] by a deliberate

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[12] There is, however, specific statutory language that directly suggests that charging the same offenses is required. MCL 777.46 (OV 16) explicitly permits consideration of uncharged offenses in certain limited circumstances:

> "(a) In multiple offender or victim cases, the appropriate points may be determined by adding together the aggregate value of the property involved, **including property involved in uncharged offenses or charges dismissed under a plea agreement.**
>
> * * *
>
> (c) **The amount of money or property involved in admitted but uncharged offenses or in charges that have been dismissed under a plea agreement may be considered.**" MCL 777.46(2).

As the prosecution itself notes, "[c]ourts cannot assume that the Legislature inadvertently omitted from one statute the language that it placed in another statute, and then, on the basis of that assumption, apply what is not there." Farrington v Total Petroleum, Inc., 442 Mich 201, 210 (1993). Thus, the absence from MCL 777.31 (OV 1) and MCL 777.33 (OV 3) of a provision explicitly permitting scoring for uncharged conduct is telling. The Legislature elsewhere specifically made clear when conduct that had not resulted in a conviction could be used to score particular variables. See, e.g., MCL 777.42(2)(a)(ii) (OV 12); MCL 777.43(2)(a) (OV 13).

legislative decision, but it is a natural consequence of the Legislature's offense-specific approach to guidelines scoring. Put another way, whether one is **charged** is not so much the important concern, but an indicator of the true concern: whether the defendant has been **convicted** of the particular crime being scored. If a defendant has not been charged with an offense, she could not have been convicted of it, and if she was not convicted, she could not be sentenced for it. Thus, no sentencing guidelines would be scored for an uncharged offense. For those offenses in which points are assessed to comport with the scoring of co-offenders, the judge must assess the same number of accurately scored points as the co-offenders received **for that same offense** – so each of the defendant's crimes would be scored based on the scores of the others for that particular crime only.

Notably, if the defendant is the only offender charged with a particular crime in a multiple offender case, the absence of an identical charge for a co-offender does not stop a court from scoring OV 1. It simply stops the judge from deferring to another offender's score – or from deferring to the wrong one. This is not a matter of adding language to the statute. Rather, it is simply the natural consequence of a Legislative scheme in which the offense variables are scored based on the particular offense at issue rather than on some amorphous transactional view.

This case provides a good example, as what the Court of Appeals did here followed both the letter and the spirit of the law. Since this was a multiple offender case[13] – a legal proceeding based on an offense in which there was more than one criminally culpable party – the court was required under MCL 777.31 and MCL 777.33 to score Ms. Morson the same number of points for OV 1 and OV 3 as Northington had been scored at her sentence for armed robbery. Contrary to the prosecution's assumption, fifteen points on OV 1 was the highest number of accurately scored

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[13] Contrary to the prosecution's assumption, (Plaintiff-Appellant's Brief at 20, n 10), that a case is a "multiple offender case" does not imply that collective action was necessarily involved in all of the offenses charged. That is but one possibility encompassed by the broad phrasing.

points – the number of points attributable to the highest-scoring category that applied (subsection (1)(b)).

If one follows the legislative prescription, the Court of Appeals decision here follows naturally. The first step is to consult MCL 777.22, which sets forth which offense variables are to be scored in which types of offenses. Proceeding to score the robbery offense, a crime against a person, offense variable one must be evaluated. As noted on Northington's robbery SIR, (252a), it was determined that during the robbery, a weapon was pointed at the victim, but not discharged, making 15 points the highest number of points attributable under MCL 777.31(1). Under MCL 777.31(2)(a), only one person was placed in danger of injury during the robbery: Sevakis. Bish did not come upon Northington until after the robbery was complete. See People v Randolph, 466 Mich 532 (2002) (noting that the legislature has not chosen to extend robbery to include the use of force to effect an escape). Under MCL 777.31(2)(b), since one offender was assessed 15 points for the use of a weapon during the robbery, all offenders must receive that same score for that offense. Since this comported with the initial determination under MCL 777.31(1), both subsections of the statute are satisfied. Likewise with OV 3, as no one was injured during the robbery.

This court owes no deference to Judge McDonald, Ms. Morson's sentencing judge, because he felt compelled by law to assign points for robbery based on the co-participant's scores, but used the wrong ones – the scores from the AWIM offense. (210a-211a). This was wrong as a matter of law if deliberate and clearly erroneous as a matter of fact if he inadvertently assumed that Northington's **robbery** guidelines were scored at 25 points for OV 1 and OV 3. The only deference that would be due, such that "any evidence" in support of a decision ends the matter, is due to the scoring adopted by the prior judge (Judge Howard) in determining that the highest number of points

applicable for Northington's robbery was 15 on OV 1 and 0 on OV 3.[14] That decision was not clearly erroneous. On the facts of this case, it is the only reasonable score.

[14] The prosecution also suggests that this Court should base its decision on Northington's AWIM guidelines, but ignore her guidelines for the other offenses because it was the AWIM sentence that controlled and because there was a Cobbs agreement. However, robbery is of the same crime class as Assault with Intent to Murder, Class A. MCL 777.16d and MCL 777.16d. And the reality is that the robbery guidelines were scored and the prosecution could have challenged them had it seen fit to do so. More to the point, it is clear that the prosecutor was aware of the potential impact of Northington's case on Ms. Morson's, as the prosecution's own appendices show that the trial prosecutor deliberately tried to elicit incriminating information from Northington at the plea-taking to assist his case against Ms. Morson. (245a-247a).

D. THE NUMBER OF PERSONS PLACED IN DANGER UNDER MCL 777.39 (OV 9) INCLUDES ONLY THOSE ENDANGERED BY THE PARTICULAR OFFENSE BEING SCORED.

Question Presented by the Court:

> (5) whether under MCL 777.39 (OV 9) the number of persons placed in danger includes only those persons who are placed in danger during the particular crime for which defendant is being scored (here, armed robbery), or whether that number includes all persons placed in danger at any point during the criminal episode

Statutory Language:

> Sec. 39. (1) Offense variable 9 is number of victims. Score offense variable 9 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) Multiple deaths occurred ..... 100 points
> (b) There were 10 or more victims ..... 25 points
> (c) There were 2 to 9 victims ..... 10 points
> (d) There were fewer than 2 victims ..... 0 points
>
> (2) All of the following apply to scoring offense variable 9:
>
> (a) Count each person who was placed in danger of injury or loss of life as a victim.
> (b) Score 100 points only in homicide cases.

As with the statutes for OV 1 and OV 3, the language of MCL 777.39 (OV 9) does not specify that any transactional approach is appropriate. The mere fact that the variable contemplates the possibility of multiple victims says no more than that a single offense can pose danger to more than one person. There is no specific language indicating that the Legislature intended to depart from the default rule that each variable is offense-specific. As such, this question is answered

directly by the Legislature's general rule of offense-specific scoring, as set forth at the outset of Issue I.

Looking to the facts of this case for illustration, one is a victim of the robbery, even if not the person from whom property is taken, if one is put in danger **by the robbery**. This may include bystanders at the robbery of a convenience store, even if they ultimately did not lose any property, if they were placed in harm's way by the presence of a weapon while the perpetrators were taking the property. The absence of language in OV 9 explicitly stating that a "victim" must be a victim of the offense being scored is particularly unhelpful because OV 9 also does not specify that a "victim" must be a victim of the defendant's or accomplice's conduct. Yet, it would be absurd to penalize one for the mere existence of a large number of victims of someone else's conduct for whom the defendant is not even arguably responsible.

The prosecution's reliance on the disfavored doctrine of "legislative acquiescence" does not compel a different result, and is particularly troubling in this case. The prosecution points to judicial construction of the former, judicial, sentencing guidelines and relies on People v Hawkins, 468 Mich 488, 508-510 (2003) for the proposition that the Legislature is presumed to have adopted any terms of art used in those guidelines by its failure to affirmatively define all such terms differently in the Legislative guidelines. In the first instance, the prosecution's purported reliance on the "re-enactment rule" discussed in Hawkins at 510, n 21 is misguided. There is simply no prior legislative act which has been "re-enacted" by the statutes in question here. The prior terminology construed by the prosecution came from judicial construction of the court's own guidelines, so the re-enactment rule is simply inapplicable.

Further, the import of Hawkins was that imputing meaning to the Legislature's silence was inappropriate. The prosecutor here attempts to do exactly what the defendant was criticized for

doing in Hawkins: require the Legislature to "scan our appellate casebooks to discern judicial construction" of every possible term of art and make an explicit definition out of it. Hawkins, 509, n 20. The defendant in Hawkins had argued that a statutory analog to the Fourth Amendment contained an exclusionary rule, despite the statute's silence on that point. This Court rejected his contention that because the statute had been amended after People v Sherbine, 421 Mich 502 (1984), which had interpreted the statute to have an exclusionary rule, the legislature implicitly adopted that view as well when making other changes to the statute. Just so, this Court should reject the prosecution's contention that the Legislature intended to adopt all construction of the former judicial guidelines terms when it re-worked the entire guidelines scheme.

Indeed, acquiescing to the Legislature's silence on a particular term is particularly inappropriate here because the Legislature did not simply adopt wholesale the former judicial guidelines. Rather, it created a commission to determine the structure of new guidelines. Under these circumstances, differences between the Legislative guidelines and the old judicial guidelines should be expected. The interpretation of the former is best left to the plain meaning of the statutes, and should be based on what the Legislature said, not on what it did not say.

There is no reason to believe that a common, and commonly understood, word like "victim" should be given a "peculiar" construction as a term of art. Even so, it is simply too far a stretch to construe that alone to refute the overwhelming evidence set forth in Issue I above for the offense-specific view of the offense variables, in which the term "victim" is easily and naturally understood to mean the person or persons put in danger by the offense for which the defendant is being scored.

II. THE DUE PROCESS CLAUSES OF THE STATE AND FEDERAL CONSTITUTIONS REQUIRE A JURY DETERMINATION BEYOND A REASONABLE DOUBT OF THE ELEMENTS OF ANOTHER PERSON'S OFFENSE BEFORE A COURT CAN BASE A DEFENDANT'S SENTENCE ON THE OTHER PERSON'S CONDUCT.

Question Presented by the Court:

> (6) Whether the due process clauses of the state and federal constitutions require that the prosecution prove the elements of a crime that someone else committed before a court can base a defendant's sentence on the actions of the other person

In the context of this case, the constitution prohibits scoring Ms. Morson for Northington's shooting of Bish for two independent reasons. First, the constitutional rights to a trial by jury and to due process of law require that those facts **which increase the legislatively prescribed range of punishment** must be found by a jury, beyond a reasonable doubt. US Const, Ams V, VI, XIV; Const 1963, art 1, §§ 17, 20; Ring v Arizona, 536 US ___; 122 S Ct ____; 153 L Ed 2d 556 (2002); Harris v United States, 536 US 545; 122 S Ct 2406; 153 L Ed 2d 524 (2002); Apprendi v New Jersey, 530 US 466; 120 S Ct 2348; 147 L Ed 2d 435 (2000). Second, because our legal system is predicated on the notion of individual fault, and because all "elements" of an offense must be proven beyond a reasonable doubt to a jury, the prosecution must prove the elements of the other person's crime as part of a greater showing: **that the defendant is also legally responsible for the other person's acts**. Apprendi, et. al., supra; Jackson v Virginia, 443 US 307; 99 S Ct 2781; 61 L Ed 2d 560 (1980); In re Winship, 397 US 358; 90 S Ct 1068; 25 L Ed 2d 358 (1970); Nye & Nissen v United States, 336 US 613, 618; 69 S Ct 766; 93 L Ed 2d 919 (1949). See also People v Bearss, 463 Mich 623, 629-630 (2001).

A. THE CONSTITUTIONAL DUE PROCESS AND JURY TRIAL RIGHTS REQUIRE A JURY DETERMINATION BEYOND A REASONABLE DOUBT OF EVERY FACT THAT WOULD INCREASE A DEFENDANT'S STATUTORY SENTENCING GUIDELINES RANGE.

Before increasing a defendant's statutory sentencing guidelines range based on certain essential facts, there must be a jury determination of those facts beyond a reasonable doubt. Ring v Arizona, supra; Harris v United States, supra; Apprendi v New Jersey, supra. The holding of Apprendi itself cannot be said to control the outcome here, because the facts before it involved an increase of the absolute statutory maximum for an offense. While the holding of Apprendi was thus limited, however, its core reasoning was not.[15] The constitutional reasoning essential to the outcomes in Apprendi and its progeny indicates that Ms. Morson cannot be scored on OV 1, OV 3, or OV 9 for Northington's acts in this case because there was no finding beyond a reasonable doubt in Ms. Morson's case that those acts took place and no such finding that she was responsible for them.

The core reasoning of Apprendi was that the Fifth and Sixth Amendments to the United States Constitution work together to require a jury finding beyond a reasonable doubt of any fact

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15 In Washington v Blakely, 111 Wash App 851 47 P3d 149 (2002), cert gtd sub nom Blakely v Washington, 2003 US LEXIS 7709 (U.S., 10/20/03, Docket No. 02-1632), the Washington Supreme Court held that facts warranting a departure from a legislative sentencing guidelines scheme similar to Michigan's did not trigger the Apprendi requirements. However, as will be argued below, the Washington court's holding is predicated on a misreading of Apprendi. The United States Supreme Court has granted certiorari to decide Blakely. The defense contends that the high court will reverse in Blakely, based on a faithful reading of Apprendi and Ring. At any rate, until such time as Blakely is decided, this Court must do its best to faithfully interpret and apply the Supreme Court's jurisprudence.

that constitutes an "element" of an offense, as opposed to merely a "sentencing factor." Apprendi was clear, though, that "[In re Winship]'s due process and associated jury protections extend, to some degree, 'to determinations that [go] not to a defendant's guilt or innocence, but simply to the length of his sentence.'" Apprendi, 484 (quoting Almendarez-Torres v United States, 532 US 224, 251; 118 S Ct 1219; 140 L Ed 2d 350 (1998)). Critically, a fact is not merely a "sentencing factor" simply because it is characterized as such or classified under a sentencing scheme. Apprendi, 476, 494, 495. It is a matter of substantive effect, not of form. Id., 494. The critical question, then, is not whether a factual finding would cause a sentence to exceed the **absolute** statutory maximum, but whether it amounts to an "element" as opposed to merely a sentencing factor. See Harris, 153 L Ed 2d at 534.

Although Apprendi did not set forth a rigid test for what constitutes an element, it determined that at least one thing was. As the court noted in defending its historical analysis: "Put simply, facts that expose a defendant to a punishment **greater than that otherwise legally prescribed** were by definition 'elements' of a separate legal offense." Apprendi, 484 n 10 (emphasis added). Notably, while exceeding the absolute statutory maximum sentence was clearly **sufficient** to meet this definition, Apprendi did not hold that it was **necessary**.

Rather, Apprendi referred to the important concern in a number of places: a judge's discretion was historically permitted "within the range prescribed by statute. . . within statutory limits," Id., 481, and "a state scheme that keeps from the jury facts that 'expose defendants to greater or additional punishment' may raise serious constitutional concerns." Id., 486. The recognition of judges' broad discretion in sentencing "has been regularly accompanied by the qualification that that discretion was bound **by the range of sentencing options prescribed by the legislature**." Id., 481 (emphasis added). This is so because "[t]he degree of criminal culpability the

legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment." Apprendi, 495. Thus, Apprendi stands for the proposition that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the **prescribed range of penalties** to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." Apprendi, 490.[16]

Here, scoring Ms. Morson for Northington's shooting of Bish without a jury determination of the guidelines factors based on that conduct runs afoul of this proscription by Apprendi and its progeny. Facts which add points to a defendant's offense variable scores so as to increase the legislatively mandated guidelines range constitutes an increase in the statutorily "prescribed range of penalties":

> "If a defendant faces punishment **beyond that provided by statute** when an offense is committed **under certain circumstances but not others**, it is obvious that both the loss of liberty and the stigma attaching to the offense are heightened; it necessarily follows that the defendant should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached." Apprendi, 484.

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16 Justice Scalia, one of the five justices in the majority in Harris, expressed a consistent view when concurring in Ring:

> "the fundamental meaning of the jury-trial guarantee of the Sixth Amendment is that all facts essential to imposition of **the level of punishment** that the defendant receives. . . must be found by the jury beyond a reasonable doubt." Ring, 153 L Ed 2d at 578 (Scalia, J., concurring).

Justice Scalia also joined in Part I of Justice Thomas' concurrence in Apprendi itself, expressing the view that "One need only look to the kind, degree, or range of punishment to which the prosecution is by law entitled for a given set of facts. Each fact necessary for that entitlement is an element." Apprendi, 501 (Thomas, J., concurring).

MCL 777.31, 777.33, and 777.39 – as with all of the offense variables – state not only a minimum score that is appropriate for certain types of conduct, but also a maximum. The court must score **only** the highest number of points **applicable** – the court must first determine which enumerated circumstances apply and only then assess the highest point value corresponding to those circumstances. The consequence of being scored for more aggravated circumstances is that the judge becomes authorized, and required, to mete out a presumptively higher range for the minimum term when the total offense variable score places the defendant into a higher sentencing grid. See MCL 777.21(1)(c) (directing the determination of a sentence range based on the grid resulting from variable scores) and MCL 769.34(3) (requiring a minimum sentence within the prescribed range absent substantial and compelling reasons for departure). Thus, to assess points for offense variables based on certain facts so that one's guidelines grid increases is to enhance the statutorily prescribed range of punishment as discussed in Apprendi. In a very real sense, a defendant is thereby exposed to "punishment greater than that otherwise legally prescribed." See Apprendi, 484 n 10. A defendant "should not – at the moment the State is put to proof of those circumstances – be deprived of protections that have, until that point, unquestionably attached." Id., 484.

Harris v United States, supra, does not compel a different result. The court in Harris engaged in statutory construction to hold that a fact which resulted in a mandatory minimum sentence was merely a sentencing factor rather than an element. Critically, though, the court found that the statutory section in question

> "does not authorize the judge to impose 'steeply higher penalties' – or higher penalties at all – once the facts in question are found. Since the subsections alter only the minimum, the judge may impose a sentence well in excess of seven years, whether or not the defendant brandished the firearm." Harris, 153 L Ed 2d at 536.

This is patently not the case with Michigan's legislative sentencing guidelines, which increase the presumptive range for the sentence, authorizing higher penalties based on the facts in question. Facts which determine the legislatively prescribed sentencing ranges fall somewhere between the holdings in Harris and Apprendi, but cannot be logically distinguished from the essential reasoning behind the entire Apprendi line of cases.

Although the United States Supreme Court's decision in Ring v Arizona, supra involved the imposition of the death penalty, its reasoning provides a close parallel to the circumstances here and demonstrates that it is not the absolute "maximum" sentence that is important, but the maximum legally authorized punishment. In Ring, the jury's felony murder verdict apparently authorized the absolute maximum sentence, because, once convicted, one could expect a penalty of either death or life imprisonment. However, another Arizona statute required a special hearing on whether to impose the death penalty, and the sanction of death was conditioned on certain factual findings by a judge. Ring, 566. The United States Supreme Court reversed the death sentence, holding that defendant Ring was entitled to a jury verdict beyond a reasonable doubt on those factual findings. In doing so, the high court disagreed with Apprendi's conclusion that "[O]nce a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed.'" Ring, 573 (quoting Apprendi, 530 US at 497).[17]

In Ms. Morson's case, the absolute maximum sentence allowable for armed robbery is life in prison – just as the death penalty was the absolute maximum sentence in Ring. That did not end the inquiry, in Ring, however, and it does not end it here. Id., 566. In Ring, a separate statute required a special finding before imposition of the death penalty. Here, separate statutes – namely

MCL 777.31(2)(b) (OV 1), MCL 777.33(2)(a) (OV 3), and MCL 777.39 (OV 9) – condition the legislatively prescribed range of punishment on the finding of certain facts: that another person discharged a weapon at an individual causing life-threatening injury, endangering more than one person. Ms. Morson could not be scored for those acts without being charged for them and having them jury-proven.

B. MS. MORSON CANNOT BE SCORED FOR NORTHINGTON'S SHOOTING OF BISH BECAUSE THE QUESTION OF HER LIABILITY FOR NORTHINGTON'S ACTS IS AN "ELEMENT" OF AN OFFENSE THAT MUST BE DETERMINED BY A JURY BEYOND A REASONABLE DOUBT BEFORE SHE CAN BE PENALIZED FOR THOSE ACTS.

As the prosecution agrees, the dispositive inquiry in deciding whether the constitution requires a jury determination beyond a reasonable doubt is whether the facts in question are elements of some offense, or mere "sentencing factors." Harris, 153 L Ed 2d at 534. See also Plaintiff-Appellant's Brief at 33. As noted above, while authorizing a court to exceed the absolute statutory maximum sentence for an offense is a **sufficient** effect to imbue a fact with elemental status, such is not a **necessary** precondition. Even if this Court does not hold that Apprendi and its progeny apply broadly to Michigan's sentencing guidelines, the United States Supreme Court's decisions extend at least as far as the circumstances here, where a defendant was sentenced for someone else's conduct without any theory of accomplice or vicarious liability ever being charged

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[17] It is noteworthy that Ring overruled prior precedent as inconsistent with Apprendi, while disagreeing with Apprendi's own attempt to reconcile that past decision, because the prior decision was **inconsistent with the core reasoning of Apprendi**. Ring, 572-573.

and proven to a jury. Regardless of the nature of the other person's acts, a defendant's liability for those acts of another person is a separate elemental concern.

It is axiomatic under our constitutional system of criminal justice that fault is individual. Delgado v United States, 327 F2d 641, 642 (CA 9, 1964); People v Sobczak, 344 Mich 465, 469-470 (1955). The plain language of nearly every criminal statute also supports this unsurprising view by setting forth a penalty a person must serve if **that person** engages in certain acts under certain circumstances. With the advent of the aiding and abetting statute, the legislature abolished the distinction between principles and accomplices. But that statute does not depart from the principle of individual fault, as it does not truly make one liable for the actions of another. MCL 767.39. Rather, one is personally responsible for a criminal act, even if one does not commit it directly, for encouraging and assisting in its commission with a certain mens rea. People v Carines, 460 Mich 750, 768 (1999); People v Mann, 395 Mich 472, 478 (1975).[18] The fact remains that, whatever the theory of individual responsibility, there must be one.

Yet, constitutional doctrine requires that, before one may be convicted for someone else's acts, such a theory of responsibility must be proven to a jury, beyond a reasonable doubt. US Const, Ams V, VI, XIV; Const 1963, art 1, §§ 17, 20; Nye & Nissen v United States, 336 US 613, 618; 69 S Ct 766; 93 L Ed 2d 919 (1949) (conspirator can be held liable for offenses of co-conspirator that were part of a conspiracy and in furtherance of it, but those fact issues must be submitted to a jury). See also Sullivan v Louisiana, 508 US 275, 279; 113 S Ct 2078; 124 L Ed 2d 182 (1993), limited on other grounds, United States v Neder, 527 US 1; 119 S Ct 1827; 144 L Ed 2d 35 (1999); Jackson v Virginia, supra; In re Winship, supra. See also People v Bearss, 463 Mich 623, 629-630 (2001). Thus, when an individual has not committed an act directly, culpability for the actions of the one

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[18] It is also true that, although the principal need not be convicted, her guilt must be shown. See People v Turner, 213 Mich App 558 (1995).

who did becomes an element of an offense that the state must prove before sentencing one on the basis of that conduct. Whatever else the constitution requires, it must mean that one may not be sentenced for the acts of another without a jury determination beyond a reasonable doubt that the defendant was also criminally responsible for those acts.

Apprendi itself, though its holding was directed toward facts which increased a maximum sentence, provided additional evidence that conduct like that at issue here is elemental. In rejecting the state's argument that the hate crime enhancement was not an element, the Apprendi court described that "enhancement" as really targeting a specific mens rea. In doing so, it noted that "[t]he defendant's intent in committing a crime is perhaps as close as one might hope to come to a core criminal offense 'element.'" Apprendi, 530 US at 493. It went on to note, "It is as clear as day that this hate crime law defines a particular kind of prohibited intent, and a particular intent is more often than not the sine qua non of a violation of criminal law." Id., 494 n 18 (emphasis in original). Accomplice or vicarious liability for the acts of another is similarly directed at the question of intent, or at very least at the question of how far liability can be extended in the absence of such criminal intent under particular circumstances. Whether a defendant is criminally responsible at all for the acts in question cannot be viewed as anything other than a core jury concern.

Here, Ms. Morson was found guilty of being an accomplice to the robbery, so she is properly scored for the conduct of the co-defendant in committing the robbery of Ms. Sevakis. Ms. Morson is not liable, however, for the later assault on Bish a block away. Ms. Morson was not charged with or convicted of that offense, as principal or accomplice, and she may not be sentenced for that shooting, a separate act by the co-defendant. It is problematic that, as she was not tried for this offense, no jury was ever asked to pass on whether those acts themselves had been proven beyond a reasonable doubt. More importantly, however, a jury was never asked **whether, or to**

what extent, Ms. Morson was liable for that shooting.[19] Assuming there is a theory on which Ms. Morson could be found liable for the AWIM, she is entitled to have a jury determine beyond a reasonable doubt not only that someone committed the AWIM, but also that she is legally responsible for it.[20]

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19 Since Ms. Morson was not charged with this offense, neither is there any valid waiver of her right to a jury trial on these issues. That she was bench-tried, rather than jury-tried, thus has no impact on the result in this case.

20 Here, Ms. Morson clearly could not have been found guilty under an aiding and abetting theory, as the accomplice must assist the principal **knowing** that she intends to commit the offense, or if she **shares the same intent** as the principal. People v Carines, 460 Mich 750, 768 (1999). See MCL 767.39. There was not one shred of proof that Ms. Morson knew that Northington would shoot Bish, much less that she shared that intent. The trial court's conclusion that it was within the scope of the parties' plan to rob Sevakis is inaccurate and inapposite. There was absolutely no evidence that shooting Bish was contemplated by Ms. Morson in the agreement to rob Sevakis. According to all of the evidence at trial, the defendants specifically targeted Sevakis, at which point Ms. Morson drove away – no mention was made of shooting anyone and the co-defendant's act was an independent one for which she was separately prosecuted.

Even analyzing the offense as a conspiracy does not support the court's interpretation of the statute or the prosecution's attempts to hold Ms. Morson liable for the shooting, as the shooting took place after completion of the robbery. See People v Randolph, 466 Mich 532 (2002). Thus, the conspiracy had been consummated, and the shooting was not in furtherance of it. See Fiswick v United States, 329 US 211, 217, 67 S Ct 224, 91 L Ed 196 (1946) (conspiracy ends once objective is accomplished); People v Trilck, 374 Mich 118, 124-125 (1964) (same). Further, conspiracy is a specific intent crime. To be guilty of conspiracy, the defendant must specifically intend to combine with others and to accomplish the particular illegal objective that is the subject of the conspiracy. People v Mass, 464 Mich 615, 634 (2001) (prosecution must prove knowledge of amount of controlled substances to establish conspiracy to deliver over certain amount); People v Blume, 443 Mich 476, 485 (1993) (insufficient evidence of defendant's intent to sell narcotics in Michigan). Thus, courts do not presume an intent to commit other crimes than that which is the specific object of the conspiracy. So, for instance, an intent to sell narcotics will not be inferred merely from the fact of a conspiracy to acquire and possess them, even if one of the parties has an intent to sell. People v Atley, 392 Mich 298, 311 (1910), overruled on other grounds, People v Hardiman, 466 Mich 417 (2002). Here, Northington's shooting of James Bish cannot be attributed to Ms. Morson, who at most helped pick out Sevakis and agreed that Northington would take her purse. Even if the shooting is seen as connected to the robbery in a broader sense, it is clear that acts committed by a co-felon in an attempt to escape are not part of the conspiracy so that liability attaches for the unforeseen injury. People v Knapp, 26 Mich 112, 114-115 (1872).

The prosecution seeks to dissuade this Court from applying Apprendi broadly, as argued in Issue II.A., above, by suggesting that all guidelines variables will then become jury issues. In the first instance, it is worth noting that in order to decide this case, this Court need not confront the broader issue, because at very least, liability for someone else's acts renders the conduct here elemental, as set forth in Issue II.B. On that basis, this Court's holding could be limited to interpreting the language of OV 1, OV 3, and OV 9, so as to be constitutional. This would require simply reading the statutes to mean that, before a defendant can be assessed the same number of points as the offender with the highest score, or before she can be scored for acts against the other offender's victims, that defendant must have been found criminally responsible by a jury beyond a reasonable doubt for the co-offender's conduct. Even under the broader reading of Apprendi, as set forth under Issue II.A., for most variables, a judge's traditional discretion can still be exercised to pick a sentence somewhere within the legislative guidelines range. See Apprendi, 494, n 19.

SUMMARY AND RELIEF

Ms. Morson was scored 65 points in offense variables, placing her into grid C-IV, for a range of 108 to 180 months for armed robbery, a Class A offense against a person. (263a).[21] The offense variable scores were 25 points on OV 1, 5 points on OV 2, 25 points on OV 3, and 10 points on OV 9. In actuality, the offense variable total should have been only 20 points, as OV 1 should have been scored at 15 points, OV 3 at 0 points, and OV 9 at 0 points. Correcting the offense variable scores places Mrs. Morson into grid C-II, which specifies a presumptive sentence between 51 and 85 months. MCL 777.62. Mrs. Morson's sentence of 96 months to 30 years was, in reality, an upward departure from the appropriate guidelines range without justification.

WHEREFORE, for the foregoing reasons, Defendant-Appellant asks that this Honorable Court remand for resentencing on the grounds set forth herein.

Respectfully submitted,

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[21] The only prior record variable scored was PRV 7, at 10 points for one concurrent conviction.